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Peacekeeping, Private Security and International Human Rights Law: A Review of UN Policies

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A Review of UN Policies

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Abstract

The UN is used to 'outsourcing' or 'contracting out' its peacekeeping functions but, traditionally, this has been to states willing to contribute troops to an operation under overall UN command and control. This model itself has created tensions between contributing states and the UN. Given these conditions, and the fact that international law is traditionally seen as primarily applicable to states, it seems even more legally problematic that the UN has, in recent years, started to outsource certain peacekeeping functions to the private sector. Inevitably, issues of applicable international laws, lines of responsibility and mechanisms for accountability, are less clear. In recent years the UN has addressed this new practice by adopting a series of guidelines and policies on armed security contractors. The aim of this paper is to analyse these current UN policies in the light of their compatibility with international law, particularly international human rights law.

Keywords

UN; outsourcing; peacekeeping; private security contractors; lethal force; international human rights law

1. Introduction

In a sense the UN is used to 'outsourcing' or 'contracting out' its peacekeeping functions, but this has traditionally been to states willing to contribute troops to an operation under overall UN command and control. This model itself has created tensions between contributing states' command structures, military discipline and rules of engagement on the one hand, and the UN's overall command, control and rules of engagement on the other. In

1 terms of responsibility for any wrongful acts of peacekeepers, there remains lack of clarity as
2 to whether a UN peacekeeping operation is a subsidiary organ of the UN, which would mean
3 that legal responsibility for any wrongful acts is that of the UN,¹ or whether a peacekeeping
4 force consists of organs of members states placed at the disposal of the UN where the UN is
5 only responsible if it is in effective control of the conduct in question.² UN doctrine seems
6 unclear on this despite practice dating back to the first force emplaced in Suez in 1956.³

11 Given these conditions and the fact that international law is traditionally seen as applicable
12 primarily to states and, only more recently, to inter-governmental organisations, it seems
13 even more legally problematic that the UN has, in recent years,⁴ started to outsource certain
14 peacekeeping functions in some peace operations to the private sector. Inevitably, issues of
15 applicable international laws, lines of responsibility and mechanisms for accountability, are
16 less clear. To its credit, however, the UN has recently tried to address this new outsourcing
17 practice by adopting a series of guidelines and policies on armed security contractors. The
18 aim of this paper is to analyse these current UN policies on the use of private security
19 companies/contractors (PSCs) in peace operations in the light of the compatibility of these
20 policies with international law, particularly international human rights law and, where
21 applicable, international humanitarian law.

32 Although states contributing forces to peacekeeping (troop contributing nations – TCNs)
33 may include contractors as part of their contributions, the focus of this paper will be on the

37 ¹ Article 6 of the Articles on the Responsibility of Organisations, adopted by the International Law
38 Commission in 2011, and taken note of by the UNGA in Res 66/100 (2011).

39 ² Article 7 of the Articles on the Responsibility of Organisations 2011.

40 ³ The UN Secretariat stated in February 2004 that a 'UN peacekeeping force established by the
41 Security Council or the General Assembly is a subsidiary organ of the UN'. It stated further that 'as a
42 subsidiary organ of the United Nations, an act of a peacekeeping force is, in principle, imputable to
43 the Organization, and if committed in violation of an international obligation entails the international
44 responsibility of the Organization and its liability in compensation', UN Secretariat, *Responsibility of
45 International Organizations: Comments and Observations Received from International Organizations*,
46 UN Doc A/CN.4/545 (25 June 2004) para. 17. However, the ILC viewed Article 7 (n.2) and the 'effective
47 control of conduct' test as the most appropriate – ILC Report, UN Doc 66/10 (2011). The DPKO in its
48 'UN Peacekeeping Operations: Principles and Guidelines' of 2008 at paras 9 and 68 stated that
49 military personnel from TCNs were only placed under the 'operational control' of the UN Force
50 commander, 'but not under UN command' (available at
51 http://pbpu.unlb.org/pbps/Library/Capstone_Doctrine_ENG.pdf, accessed 9 May 2009). See further
52 C. Leck, 'International Responsibility in United Nations Peacekeeping Operations: Command and
53 Control Arrangements and the Attribution of Conduct', (2009) 10 *Melbourne Journal of International
54 Law* 1 at 7.

55 ⁴ A.G. Ostensen, 'UN Use of Private Military and Security Companies: Practices and Policies', Geneva
56 Centre for the Democratic Control of Armed Forces (DECAF, SSR Papers (3), 2011), available at
57 [http://www.dcaf.ch/Publications/UN-Use-of-Private-Military-and-Security-Companies-Practices-and-
58 Policies](http://www.dcaf.ch/Publications/UN-Use-of-Private-Military-and-Security-Companies-Practices-and-Policies) (accessed 9 May 2014).

UN's obligations under international law when directly engaging PSCs. The point here is that the UN is obliged to ensure that human rights law and humanitarian law are respected by private contractors, not just as a matter of policy, but of international law. Although the UN is not bound by treaty law on human rights or international humanitarian law it is bound by customary laws, many of which it has partly been responsible for initiating (for example, the Universal Declaration of Human Rights 1948).

After establishing that the UN is bound by international law, the paper identifies the UN's due diligence obligations under international human rights law and, where applicable, international humanitarian law, particularly as regards the use of lethal force by PSCs. Given that we are considering *armed* contractors performing certain functions for the UN, it is argued that the UN has an overriding and central concern to ensure that its policies as regards PSCs comply with human rights law and, where applicable, international humanitarian law on when lethal force is permitted.⁵ Of course there will be other due diligence obligations on the UN when engaging contractors (for example, as regards detention and treatment by PSCs) but, as this article shows, these follow the same pattern.

2. UN's Obligations under International Human Rights Law

The UN, as an international legal person, has rights and duties under international law.⁶ Exceptionally such rights and duties might arise under international treaties or agreements such as host state agreements, but the backbone of its duties derive from customary international law, on which there is a very detailed study regarding international humanitarian law by the ICRC.⁷ The International Law Commission (ILC) adopted Articles on

⁵ The paper evaluates the most recent UN documents on this matter including: UN Department of Safety and Security (UNDSS), 'Policy on Armed Private Security Contractors' 2012 (abbreviated to UN's Policy on PSCs 2012); UNDSS, 'Guidelines on the Use of Armed Security Services from Private Security Companies' 2012 (UN's Guidelines on PSCs 2012); UN's 'Use of Force Policy' 2011 as found in the 'Security Policy Manual' (UN's Use of Force Policy 2011); 'Model Statement of Work' and the 'Model Contract' referenced at the end of the UN's Guidelines on PSCs 2012. Documents available at <http://www.ohchr.org/EN/Issues/Mercenaries/WGMercenaries/Pages/StudyOnPMSC.aspx> (accessed 9 May 2014).

⁶ *Reparation for Injuries Suffered in the Service of the United Nations*, 1949 ICJ Rep, 174-178; *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, 1980 ICJ Rep, 73 at 89-90.

⁷ J-M. Henckaerts and L. Doswald-Beck (eds), *Customary International Humanitarian Law* (ICRC, Cambridge University Press, 2005). There has been no equivalent study for human rights law, although there is a vast amount of academic literature containing commentary of customary human

1 the Responsibility of International Organisations in 2011, which clearly show that it is
2 possible to attribute wrongful acts to the UN,⁸ and that such responsibility is premised on
3 the UN having duties under customary international law including ones to uphold and
4 protect human rights.
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8 As well as ensuring that its peacekeepers do not violate human rights, the UN also has an
9 obligation to ensure that private persons or entities, particularly ones over which it has a
10 degree of control, do not violate human rights. That responsibility can arise from a failure
11 to fulfil these positive obligations of due diligence is referenced in Article 4 of the ILC's
12 Articles on the Responsibility of International Organisations, which states that 'there is an
13 internationally wrongful act of an international organization when conduct consisting of an
14 action or *omission*:(a) is attributable to that organization under international law; and (b)
15 constitutes a breach of an international obligation of that organization' (emphasis added).
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19 Violations of human rights often occur because states and international organisations have
20 failed to act – the violation of international law is in the form of an omission rather than as a
21 result of positive action. Under human rights law this was famously established for states by
22 the *Velasquez Rodriguez* judgment of the Inter-American Court of Human Rights, when the
23 Court decided that a state was not simply liable for the wrongful acts of its agents (police,
24 military etc.), but could be held responsible when it had failed to take adequate steps to
25 prevent a violation of human rights by non-state actors within its jurisdiction (in that case
26 shadowy death squads responsible for a large number of disappearances).⁹
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30 These obligations do not attach to the UN when it fails to act to stop human rights or
31 humanitarian law violations in Syria, for instance. In the case of international humanitarian
32 law they only apply when the UN is engaged as combatants in an armed conflict against
33 armed groups.¹⁰ In the case of human rights law, they apply only when the UN has
34 'jurisdiction' over the injured individuals in question - for instance when civilians are within
35 its care or under its control. Again borrowing from human rights jurisprudence applicable to
36 TCNs - due diligence obligations attach to them even when acting extra-territorially in
37 circumstances where they exercise control over areas or over individuals. Although human
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40 rights law. See, for example, D. Moeckli, S. Shah, S. Sivakumaran and D.J. Harris (eds), *International*
41 *Human Rights Law* (Oxford University Press, 2010).

42 ⁸ ILC, Draft Articles on the Responsibility of International Organisations, Articles 3-7, UN Doc. A/66/10
43 (2011); noted in UNGA Res. 66/100 (2011).

44 ⁹ *Velasquez Rodriguez*, Ser, C No.4 (1988), para.172.

45 ¹⁰ UNSG's Bulletin, 'Observance by United Nations Forces of International Humanitarian Law', UN Doc
46 ST/SGB/1999/13.
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rights jurisprudence is mixed, there is some indirect support from the Inter-American Commission on Human Rights, for making a further argument that when peacekeepers (or contractors) fire weapons at individuals they are in effect asserting jurisdiction over them for the purposes of human rights law.¹¹ However, the orthodox view is that found in the General Comment of the Human Rights Committee in 2004, when it stated that parties to the International Covenant on Civil and Political Rights must ensure the human rights of persons 'within the power or effective control of the forces of a State Party acting outside its territory ... such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation'.¹² It is contended that the UN has responsibility in these circumstances, which is either shared with sending states or is allocated on the basis of control at the time of the commission of the wrongful act or omission in question.¹³ The UN generally accepts responsibility for the wrongful acts of soldiers from TCNs when they are part of forces under UN command and control (the blue helmeted peacekeeping forces), but not when the UN has authorized a Coalition of the Willing under national command and control.

Increasingly coercive mandates given to peace operations by the Security Council mean that peacekeepers can potentially cross the line to become 'combatants'; in the language of the laws of war (international humanitarian law), sometimes causing confusion as to the legal status of peacekeepers who are traditionally not seen as legitimate targets. In 1999, the UN Secretary-General, in a piece of internal UN law, reasserted the civilian status of peacekeepers even in situations of armed conflict, by declaring that they are to be viewed as civilians under international humanitarian law unless and until they actively engage as combatants in an armed conflict.¹⁴

This establishes the default position of a peacekeeper as a non-combatant against whom attacks are prohibited.¹⁵ This should be contrasted with the legal status of armed

¹¹ L. Doswald-Beck, *Human Rights in Times of Conflict and Terrorism* (Oxford University Press, 2011), 19-21, citing cases where the state has been held to be in breach of the right to life when firing at a person from a distance – for example *Armando Alejandro Jr, Carlos Costa, Mario de la Pena and Pablo Morales v Cuba (Brothers to the Rescue case)* Case 11.589, Report No 86/99, 29 September 1999, para.25. But see the European Court of Human Rights decision in *Bankovic and others v 17 NATO States*, Admissibility Decision (Grand Chamber), 12 December 2001, paras. 52-3.

¹² Human Rights Committee, General Comment 31, 'Nature of the General Legal Obligation on States Parties to the Covenant', UN Doc. CCPR/C/21/Rev.1/Add.13 (2004), para.10.

¹³ Article 7, Articles on the Responsibility of International Organisations 2011.

¹⁴ UNSG's Bulletin, 'Observance by United Nations Forces of International Humanitarian Law', UN Doc. ST/SGB/1999/13, 1999, section 1.2.

¹⁵ UN Convention on the Safety of United Nations and Associated Personnel 1994, Articles 7–9.

1 contractors who may potentially (despite the UN's best efforts) become engaged as civilians
2 directly participating in hostilities under international humanitarian law. However, given the
3 restrictions put on the type of functions that PSCs can perform within UN peace operations
4 (as evidenced in the review of policies in section 3 of this paper), this scenario is highly
5 unlikely and, therefore, international humanitarian law will, only exceptionally, be the
6 applicable law, instead the relevant framework is international human rights law. In
7 exceptional circumstances when an armed conflict erupts in a situation where a peace
8 operation is deployed, peacekeepers (acting under the Chapter VII elements of their
9 mandate) may become engaged as combatants in that conflict. However, PSCs are not
10 contracted to take offensive military action but to defend UN personnel and property and
11 therefore their activities primarily remain governed by human rights law even during an
12 armed conflict.
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22 Given that contractors are not viewed as 'agents' of the UN, for whose actions the UN is
23 directly responsible,¹⁶ the UN will be responsible for their actions which violate human rights
24 when in effective control of contractors,¹⁷ but this level of control is unlikely. This, however,
25 does not leave a responsibility gap – the UN remains responsible for some of its omissions
26 which result in a violation of human rights by PSCs operating under a UN contract – so called
27 positive obligations, alternatively labeled duties of due diligence. These obligations are not
28 absolute, rather they are obligations of conduct; so the UN could be fulfilling its due
29 diligence obligations even when contractor abuse occurs, if the UN has acted appropriately.
30 Nevertheless, they require the UN to take certain measures (identified in the next section) to
31 reduce the risk of human rights violation by contractors, to respond to any violations, and to
32 provide access to justice when such violations occur.
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46 **3. UN's Obligations Regarding the Use of Lethal Force**

47 Having established that human rights law is normally applicable to the UN and, therefore,
48 should be respected by UN peacekeepers and armed contractors engaged by the UN, we
49 need to establish more precisely the obligations that the UN has when deploying armed
50 personnel to post-conflict situations where there is a high degree of risk that lethal force will
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57 ¹⁶ Article 6, Articles on the Responsibility of International Organisations 2011.

58 ¹⁷ Drawing from Article 7 of the Articles on the Responsibility of International Organisations 2011 and
59 Article 8 of the Articles on State Responsibility 2001. The 2011 Articles do not have a provision on
60 responsibility of organisations for private actors, while the 2001 Articles do.
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1 be used. Major human rights treaties make it clear that the right to life, though
2 fundamental, is not absolute. The basic principle is that life cannot be taken arbitrarily.¹⁸
3 Human rights jurisprudence shows that lethal force can be used when absolutely necessary
4 for self-defence (including defence of third parties), to effect an arrest or prevent escape of
5 a detainee, or in action taken to quell a riot or insurrection.¹⁹
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9 In the case of armed contractors engaged by the UN, the fact that they do not (nor should
10 have) the power of arrest or detention or, indeed, the right or duty to deal with riots or
11 insurrections, signifies that they can only use lethal force in cases of absolute necessity when
12 defending themselves or a third party under imminent threat. In contrast, UN peacekeepers
13 and armed police can perform governmental functions in their capacity as agents of sending
14 states present with the agreement of host states, when arresting or detaining spoilers and
15 criminals, or when tackling riots or insurrections.
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18 The UN's standard Status-of-Force Agreement (SOFA) of 1990 does not cover these issues,²⁰
19 having been drafted before peacekeeping forces had functions wider than acting as an
20 observer and buffer, and before they started engaging PSCs. However, powers of arrest,
21 detention and riot control can be read into the SOFA as belonging to military and police
22 members of the operations who, according to the SOFA, may 'possess and carry arms while
23 on duty in accordance with their orders'.²¹ PSCs with guarding and protection duties,
24 engaged by the UN and present with host state consent, should be restricted to the right of
25 self-defence. The question then becomes as to the extent of that right, since it can differ
26 greatly from jurisdiction to jurisdiction and can, in some countries, include defence of
27 property. This issue will be considered further below.
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30 As pointed out by the Human Rights Committee,²² the obligation on states and, by analogy,
31 the UN is not only to ensure that their agents do not arbitrarily take life, but to take positive
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50 ¹⁸ European Convention on Human Rights 1950, Article 2(2); International Covenant on Civil and
51 Political Rights 1966, Article 6.

52 ¹⁹ Doswald-Beck (n.11) 161-71.

53 ²⁰ 'SOFAs are negotiated formal agreements between the UN and the host country that define the
54 legal status of both the peace operation and the individual peacekeepers' - B. Oswald, H. Durham and
55 A. Bates (eds), *Documents of the Law of UN Peace Operations* (Oxford University Press, 2010) 34.

56 ²¹ Model Status of Forces Agreement for Peace-Keeping Operations, UN Doc. A/45/594 (1990), para.
57 37. See also para. 39 by which the host government agrees to accept as valid a permit issued by the
58 Special Representative or UN Commander to a member of the UN operation 'for the carrying or use of
59 firearms or ammunition in connection with the functioning' of the operation.

60 ²² Under the International Covenant on Civil and Political Rights, Article 40.
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1 measures to protect the right.²³ The UN itself has recognised that it has such obligations in
2 its 'Human Rights Due Diligence Policy on United Nations Support to Non-United Security
3 Forces' (HRDDP) 2011, which applies to national militaries and security forces supported by
4 the UN. That support must be consistent with the UN Charter and the UN's 'obligations
5 under international law to respect, promote and encourage respect for international
6 humanitarian, human rights and refugee law', such that UN support cannot be provided
7 'where there are substantial grounds for believing there is a real risk of the receiving entities
8 committing grave violations of' the above laws.²⁴

15 Rather than using the HRDDP by analogy to evaluate the UN's policies as regards PSCs, this
16 article details the positive obligations required under human rights law, and uses these to
17 evaluate UN policies. Those positive obligations, drawn from treaty body practice on both
18 law enforcement and military activities by states, are: first, the presence of clear laws
19 prohibiting the 'arbitrary use of potentially lethal force'; second, adequate training of
20 military, police, and other armed personnel to ensure they respect the law; third, adequate
21 planning and risk assessment to prevent arbitrary loss of life as much as possible;²⁵ and,
22 finally, provision for independent investigation and, if necessary, criminal prosecution of
23 violators.²⁶ Access to justice for victims should also be included in the last obligation,
24 including non-judicial avenues of redress. Before looking at the UN's policies on PSC's, the
25 article details the UN's fulfilment of these positive obligations primarily in relation to the
26 peacekeeping and police elements of a peace operation, where the UN is relying on states to
27 send troops or police.

3.1 UN Law Governing Lethal Force

45 There are a number of UN documents (more for UN police than for peacekeepers) specifying
46 when lethal force can be used; they are primarily concerned with refining the notion of self-
47 defence. The key document is the Basic Principles on the Use of Force and Firearms by Law
48 Enforcement Officials 1990,²⁷ which is viewed in the UN system as normative.²⁸ In other

²³ Human Rights Committee, 'General Comment 6 on Article 6', 30 April 1982, para.5.

²⁴ UN Doc A/67/775-S/2013/110 (2013), para.1.

²⁵ Drawing upon European Court of Human Rights, *McCann v United Kingdom*, Judgment (App. No. 18984/91), 27 September 1995.

²⁶ Doswald-Beck (n.11), 162, 167.

²⁷ Endorsed in GA Res. 45/166 (1990) para. 4.

²⁸ Doswald-Beck (n.11), 163.

1 words this document does not simply apply to member states but to the UN itself. Although
2 the Basic Principles 1990 may well have become custom, its terms are limited to police
3 enforcement. Its statement that lethal force is permitted, inter alia, in cases of 'self-defence
4 or defence of others against the imminent threat of death or serious injury' reinforces the
5 self-defence standard under human rights law.²⁹ Although the Basic Principles 1990 also
6 cover the use of lethal force in law enforcement functions such as arrest or detention
7 these,³⁰ as have been stated, are inapplicable to armed contractors.
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13 The 1990 Basic Principles do not permit the use of lethal force in defence of property, while
14 some UN documentation on peacekeeping and police seems to allow for this.³¹ The use of
15 lethal force to protect property may, in very limited circumstances, be compatible with the
16 right to life. The UN Special Rapporteur on extrajudicial summary or arbitrary executions has
17 stated that 'protection of property cannot be invoked as a justification for the use of
18 potentially lethal force unless it is somehow linked to the defence of life'.³² This limitation is
19 very important given that private armed contractors may be given the function of protecting
20 property. In these circumstances, human rights law would suggest that they cannot simply
21 use potentially lethal force when carrying out that job, for example, to prevent theft of
22 supplies; it can only be used when the defence of property is essential to defend life. This
23 could be when civilians are within the property, or perhaps when lethal force is used to
24 prevent insurgents acquiring and using weapons against peacekeepers or civilians.³³ This
25 issue will be returned to when examining UN policies on armed contractors.
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42 **3.2 Training of Personnel**

43 Analysis of UN documents on training reveals that for peacekeepers the responsibility to
44 ensure that soldiers are properly trained, including presumably basic weapons training, falls
45 on member states, though the Secretary General is requested to prepare training materials
46 to assist those states in this regard.³⁴
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52 ²⁹ GA Res 45/166 (1990) para. 9.

53 ³⁰ Ibid.

54 ³¹ For example, Policy on Formed Police Units in United Nations Peacekeeping Operations
55 (UNDPKO2009.32), para. 21.

56 ³² Report of the Special Rapporteur annexed to UN Doc. A/66/330, 30 Aug. 2011, para. 43.

57 ³³ K.M. Larsen, *Human Rights Treaty Obligations of Peacekeepers* (Cambridge University Press, 2012),
58 376-7, 379-80.

59 ³⁴ UNGA Res 49/37 (1995).
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1 Pre-Deployment Training Standards are since 2007 now being produced by the UNDPKO but
2 they are not encouraging when considered against the applicable laws that have been
3 identified thus far. For example, the 'Human Rights Standard in the Use of Force' produced
4 in 2009, does not contain a 'standard' as such but simply states that the training module on
5 this issue will 'provide participants with a clear understanding of the human rights
6 implications relating to the use of force and firearms by law enforcement officials'.³⁵
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11 Even more worryingly in 2011, the DPKO produced the 'UN Protection of Civilian PDT
12 Standards', which on the one hand, restates the rules on self-defence that have been
13 identified in the context of peacekeeping since 1956;³⁶ on the other, they then go much
14 further than this when contemplating mandates with Chapter VII elements. The document
15 provides that all UN peacekeepers have an inherent right to defend themselves, if necessary,
16 by using force, up to and including deadly force; and also that peacekeepers, authorised
17 under Chapter VII, can use such force 'to prevent, pre-empt, and respond effectively to acts
18 of, or imminent threat, of violence against civilians from any source, including host state
19 bodies or authorities'.³⁷
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28 As a 'standard' this leaves a great deal to be desired, potentially encouraging broad
29 interpretations of when deadly force can be used and when weapons can be fired, for
30 instance 'pre-emptively'. Furthermore, although it is true to say that the impartial
31 enforcement of a protection mandate should not distinguish between state and non-state
32 actors who threaten civilians, the fact is that action against the government will constitute
33 enforcement action rather than peacekeeping.³⁸
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40 The issue of pre-deployment training of armed contractors is discussed below, although this
41 brief overview suggests that it is not satisfactory in the case of regular peacekeepers. The UN
42 must be careful to restrict PSCs so as not to enable or empower them to operate under the
43 Chapter VII 'necessary measures' elements of the mandate. While the military components
44 of the peace operation can operate under the enforcement aspects of the mandate, PSCs
45 cannot as they are confined in law to self-defence and defence of third parties under
46 imminent existential threat.
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56 ³⁵ ITS/DPET, 'Police STM: Human Rights Standards in the Use of Force', 4/2009, 9.

57 ³⁶ UNSG's Second and Final Report on UNEF I, UN Doc A/3302 (1956).

58 ³⁷ DPKO, 'UN Protection of PDT Standards' (UNDPKO, 2011) 20.

59 ³⁸ N. Tsagourias, 'Consent, Neutrality/Impartiality and the Use of Force in Peacekeeping', (2006) 11
60 *Journal of Conflict and Security Law* 465 at 469.
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3.3 Adequate Planning and Risk Assessment

Training, no matter how comprehensive, will only be effective if there has been adequate planning and risk assessment so that the force deployed is capable of meeting the exigencies of the situation and environment it is deployed to. This is recognised by the UN's Capstone Doctrine 2008 (containing peacekeeping principles and guidelines):

The Secretariat has a responsibility to provide the Security Council with an accurate assessment of the risks associated with its decision to deploy a United Nations peacekeeping operation, and ensure that its mandate and capabilities are tailored to the requirements of the situation.³⁹

However, the realities of putting a peace operation together often result in operations that are, at least initially, inadequate for the task.

The reality is that in the deployment period up to full complement, the greatest risk is to civilians, UN personnel and to the peace process, not from the arbitrary use of force by UN personnel but from on-going violence committed by non-state actors. There may be a temptation to use significant numbers of readily available armed contractors to fill the gap, while regular military and police personnel from TCN's are deployed, but this must be tempered, as it is in this initial stage when there is most danger to the UN in establishing peace. Given that armed contractors can only defend themselves and civilians under imminent attack then they could be deployed in this initial period in limited numbers in limited circumstances to protect refugee camps, for instance, where lives are immediately at stake. But to deploy them more widely into a violent situation, where offensive force is required to consolidate the peace, would entail a significant risk of dragging them into a conflict situation.

3.4 Investigation and Access to Justice

Arguably, even in the exceptional circumstances of armed conflict, independent investigation of uses of lethal force by UN peacekeepers, police or contractors, as well as

³⁹ United Nations Peacekeeping Operations: Principles and Guidelines (UN, 2008), 49 (available at http://pbpu.unlb.org/pbps/Library/Capstone_Doctrine_ENG.pdf, accessed 12 May 2014).

1 when the lives of UN personnel are themselves lost, is required. In conditions short of armed
2 conflict such investigation is clearly required under human rights law.⁴⁰ Within the UN
3 system, this function is performed by the Office of Internal Oversight Services (OIOS),
4 although its 'Investigations Manual' of 2009 makes it clear that each TCN has 'sovereign
5 rights and primary responsibility' to investigate allegations of misconduct by its military
6 personnel, but OIOS investigators may play a role if the TCN so requests, or if the TCN has
7 failed to respond to a complaint, but such an investigation is subject to the national and
8 military law of the TCN.⁴¹

14 Furthermore, there should be a remedy for any established breach of human rights law.⁴²
15 However, in general terms victims of human rights abuse at the hands of UN peacekeepers
16 and UN police do not have access to established remedies or remedial mechanisms, rather
17 any access to justice is provided on ad hoc basis.⁴³ Clearly this deficient system does not
18 apply automatically to PSCs who are engaged by contract and, therefore, subject to a
19 different regulatory legal regime reviewed below.

30 **4. UN's Policies and Guidelines For Contractors under Human Rights Law**

33 Having established that the UN is bound by human rights law and that this entails a number
34 of positive obligations when deploying armed personnel to post-conflict situations, and
35 having highlighted how far the UN has gone towards implementing these obligations in
36 relation to UN peacekeepers and UN police and, while doing this, taking the opportunity to
37 flag up some potential difficulties in applying these standards to armed contractors, the
38 purpose of this section is to review the UN's recent policies on contractors in the light of its
39 positive obligations. Before looking at each of the positive obligations outlined in section 3, it
40 is first necessary to consider the functions envisaged for PSCs in the UN's policies and
41 guidelines, and consider their compatibility with international law especially human rights
42 law.

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55 ⁴⁰ Doswald-Beck (n.11), 184.

56 ⁴¹ OIOS, Investigations Manual (UN. 2009), para 6.5.5 (available at
57 http://www.un.org/Depts/oios/pages/id_manual_mar2009.pdf, accessed 12 May 2014).

58 ⁴² Article 8, Universal Declaration of Human Rights (1948); Article 2(3), International Covenant on Civil
59 and Political Rights 1966.

60 ⁴³ Oswald, Durham and Bates (n.20), 324.

4.1 PSC Functions and International Human Rights Law

The UN's Policy on PSCs 2012 states that PSCs cannot be contracted by the UN except on an exceptional basis to perform functions of protecting UN personnel, premises and property, and to provide mobile protection of UN personnel and property.⁴⁴ In the UN's Guidelines on PSCs 2012 more detail is given of basic PSC functions when protecting UN personnel and property to include: using electronic search equipment, personnel and vehicle searches, visitor control systems, identifying and reporting suspicious persons or objects and, probably most controversially, containing or removing suspicious persons or objects which may cause a security concern.⁴⁵ As long as the latter is not interpreted to include arrest or detention (and the wording seems chosen to avoid this interpretation but to still allow PSCs to deal with threats) and as long as suspects are handed over to the host state or to UN peacekeepers (or released within a very short period), then this appears to be a suitably limited range of functions; ones that do not trespass on the roles of the host states or sending states or, indeed, the UN in performing law enforcement functions. The basic functions of PSCs when providing mobile protection services include: preventing vehicles from intercepting the convoy, extracting the convoy from ambush sites, and clearing the route to enable convoy movement,⁴⁶ functions which might suggest more coercive action but any use of force in this regard will be a response to an attack as discussed below. What follows is centred upon an analysis of when force might be used by PSCs and the compatibility of those conditions with the right to life under human rights law.

4.2 Law on when Lethal Force can be used by PSCs

The UN's Policy on PSCs 2012 states that the objective of PSCs working for the UN is to 'provide a visible deterrent to potential attackers and an armed response to repel any attack consistent with the' UN's Use of Force Policy 2011, host state legislation and international law.⁴⁷ It goes on to say that the PSCs policy should also be consistent with the International Code for Private Security Providers 2010.⁴⁸ The UN's Guidelines on PSCs 2012 envisage PSCs

⁴⁴ UN's Policy on PSCs 2012 (n.5), para.9.

⁴⁵ Ibid.

⁴⁶ Ibid., para.11.

⁴⁷ Ibid., para.8.

⁴⁸ Ibid., para.24. The International Code of Conduct for Private Security Providers 2010 is a non-binding instrument to which PSCs can sign up, thereby committing themselves to operating within identified human rights and other standards, including remedial mechanisms, to be overseen by a combination

acing both as a deterrent against potential attackers and as an ‘armed response to repel any attack’,⁴⁹ but the detail is left to the UN’s Use of Force Policy 2011 and the International Code of Conduct 2010.

The UN’s Use of Force Policy 2011 is aimed at UN security officials, which include contracted security personnel responsible for the protection of UN personnel and assets.⁵⁰ It divides force into ‘deadly force’ that creates a ‘substantial risk of causing death or serious bodily injury’,⁵¹ and ‘non-deadly force’ which includes ‘any physical effort used to control or restrain another, or to overcome the resistance of another’.⁵² Non-deadly force can be exercised: in self-defence (including defence of UN personnel and others), to maintain order and security, to prevent damage to UN property, and to detain and to prevent the escape of someone who is a threat or who has committed a serious crime.⁵³ This phraseology could be interpreted as permitting PSCs to perform law enforcement functions which, while not violating the right to life (as the level of force is non-deadly), could cause problems as regards other human rights – such as freedom from arbitrary arrest or the right to liberty. It has been contended above that, in the context of peace operations, law enforcement functions should only be undertaken by state agents (from TCNs or from the host state) not by armed contractors, irrespective of whether such functions could be performed by armed contractors in their home state of nationality. Both the UN’s Policy on PSCs 2012 and Guidelines on PSCs 2012 make clear that the UN should only contract with PSCs for confined protection purposes thereby excluding them from law enforcement functions. Certainly in respect of the use of deadly force by contractors, the UN’s Use of Force Policy 2011 is in line with the right to life since it is confined to self-defence, defence of UN personnel and others,⁵⁴ and does not extend to UN property or to the prevention of serious crimes.

The UN’s Use of Force Policy 2011 is certainly less problematic in terms of compatibility with international law than the International Code of Conduct for Private Security Providers of 2010, which does envisage law enforcement functions being performed by PSCs. Although the Code restricts lethal force to that used in self-defence and defence of others from

of states (drawn from the states that have signed up to the Montreux Document 2008), PSCs and civil society organisations (see <http://www.icoc-psp.org/>, accessed 12 May 2014)..

⁴⁹ UN’s Guidelines on PSCs 2012 (n.5), para.16.

⁵⁰ UN’s Use of Force Policy 2011 (n.5), para.4.

⁵¹ Ibid., para.5.

⁵² Ibid., para.6.

⁵³ Ibid., para.10.

⁵⁴ Ibid., para.11.

1 imminent threat it also includes the use of lethal force to prevent serious crime.⁵⁵
2 Furthermore, the Code foresees the host state contracting with PSCs ‘to assist in the
3 exercise of a state’s law enforcement authority’, in which case the use of force should
4 comply with the UN’s 1990 Basic Principles on the Use of Force and Firearms by Law
5 Enforcement Officials.⁵⁶ Detention by PSCs, if contracted by the host state, is also envisaged
6 by the Code,⁵⁷ as is the temporary ‘apprehending’ of persons while acting in self-defence.⁵⁸
7 While there is a debate to be had about the legality of outsourcing of detention and arrest
8 by host states, the UN, when engaging PSCs, does not envisage PSCs performing such
9 functions on its behalf. The reference to the International Code of Conduct 2010 in the UN’s
10 Policy on PSCs 2012 and Guidelines on PSCs 2012 is unhelpful but, in any case, these
11 documents make it clear that the UN’s Use of Force Policy 2011 is the overriding standard to
12 be applied when the UN engages PSCs.⁵⁹ Thus, reading the documents together, the UN’s
13 standards on both lethal and non-lethal force by PSCs are compatible with human rights law.
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27 **4.3 Pre-Deployment Training of PSCs**

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29 The UN’s Policy on PSCs 2012 places the burden of training on the company itself to ensure
30 that its personnel have the ‘requisite skills and experience to perform the services’ in
31 accordance with the contract.⁶⁰ The UN’s Guidelines on PSCs 2012 state that the PSC must
32 certify that its personnel have been trained on the International Code of Conduct 2010, the
33 UN’s Use of Force Policy 2011 and UNDSS’s ‘Security Manual of Instruction on the Use of
34 Force Equipment, including Firearms’. The Guidelines also specify other training to be
35 carried out by PSCs: firearms handling, counter-terrorist searches, convoy escort and
36 protection, human rights law and application, and use of force training.⁶¹ PSC compliance
37 with these requirements is subject to regular reviews (analysed in the following section). The
38 UN’s ‘Statement of Works’ 2012 provides that contractors must submit a technical proposal,
39 which should include firearms permits, evidence that personnel have been screened for
40 criminal records and are suitably trained (including in firearms, medical response, use of
41 force, situational response i.e. crowds and demonstrations and incident response i.e. suicide
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54 ⁵⁵ International Code of Conduct 2010 (n.48), para.31.

55 ⁵⁶ Ibid., para.32.

56 ⁵⁷ Ibid., para.33.

57 ⁵⁸ Ibid., para.34.

58 ⁵⁹ UN’s Policy on PSCs 2012 (n.5), para.24; UN’s Guidelines on PSCs 2012 (n.5), para. 34.

59 ⁶⁰ UN’s Policy on PSCs 2012 (n.5), para.25.

60 ⁶¹ UN’s Guidelines on PSCs 2012 (n.5), para.39.

borne attacks and armed assault).⁶² The suggestion that PSCs should be actively involved in a law enforcement capacity in crowd control is problematic, although the provision can be interpreted narrowly to enable PSCs to have limited crowd control functions but only when they arise in the course of their protection duties.

4.4 Adequate Planning and Risk Assessment

The UN's Policy on PSCs 2012 envisages PSCs being used by the UN on an 'exceptional basis ... when threat conditions and programme need warrant it'.⁶³ This is further elaborated upon to make it clear that security will be drawn from the host state, TCNs or the UN's own security officers first.⁶⁴ The Policy understands security in quite a limited sense of the security and protection of UN personnel, and the premises and property of the UN,⁶⁵ so in this sense the policy is suitably cautious about deploying private contractors into a volatile situation. The issue remains of whether the use of lethal force by PSCs in defence of UN property is permitted remains but, as the analysis under 3.1 shows, international human rights law does not permit this except when defence of property is essential to defend life. The UN's policies on the use of force and on the use of PSCs need to be clearer on this.

In addition to security risk assessment undertaken under the UNDSS's security risk management process, the UN's Policy on PSCs 2012 envisages tight control of PSCs by the UN with daily on-site investigation and monthly review of performance.⁶⁶ The UN's Guidelines on PSCs 2012 are even more impressive in this regard envisaging that the daily review will cover such issues as the safe handling of firearms and their storage, and the quality of responses to training questions and actual situations.⁶⁷ The monthly review shall include an assessment of all reported use of force by the PSC.⁶⁸ The UN's 'Statement of Works' 2012 declares that review should include compliance by the PSC with the 'highest standards of integrity, competence and performance in line with internationally accepted human rights standards and principles'.⁶⁹ The key, clearly, is ensuring that this supervision not only takes place but is thorough and that any violations of human rights revealed by

⁶² UN's 'Statement of Works' 2012 (n.5), paras.21-24.

⁶³ UN's Policy on PSCs 2012 (n.5), para.1.

⁶⁴ Ibid., para.2.

⁶⁵ Ibid., para.3.

⁶⁶ Ibid., paras.27-8.

⁶⁷ UN's Guidelines on PSCs 2012 (n.5), paras.45-50.

⁶⁸ Ibid., paras.51-55.

⁶⁹ UN's 'Statement of Works' 2012 (n.5), para.54.

these reviews are remedied, not only by ensuring the removal of the PSC from the post-conflict environment and from the UN's approved list of contractors and remedies sought by the UN for breach of contract,⁷⁰ but also by ensuring that there is access to justice for any victims.

4.5 Investigation and Access to Justice

The UN's Policy on PSCs 2012 states that the use of PSC's 'will be governed by a clear accountability and responsibility framework and clear operational standards', and then refers to the UN's Guidelines on PSCs 2012.⁷¹ The Guidelines provide for regular review and investigation of uses of force and other incidents, for instance, but do not address access to justice issues. Under the UN's Policy, Guidelines and Model Contract 2012 accountability of PSCs is to the UN not to any victims of arbitrary deprivation of life or liberty. Any such access to justice must be pursued against the companies themselves under the International Code of Conduct 2010, but that leaves an accountability gap for when the UN fails in its due diligence obligations when contracting with a PSC whose personnel commit human rights abuse. Victims of PSC human rights abuse do not have any remedies against the UN for the failure by the UN to fulfil its due diligence obligations.

5. Conclusion

The UN's PSC policies, guidelines ... on PSCs are largely compliant with applicable international law, specifically international human rights law. Furthermore, together they

⁷⁰ See UNDSS, 'Guidelines on the Use of Armed Security Services from Private Security Companies', Annex B. Model Contract. Interestingly the model contract allows the PSC to insert its own use of force and firearms policies in Annex E and F to the Model Contract, but these must be compliant (according to the UN's Policy and Guidelines on PSCs 2012) with the UN's Use of Force Policy 2011 and the International Code of Conduct 2010. There is little attempt, however, to incorporate these standards, nor human rights standards, into the contract itself, which may limit the UN when it seeks remedies for breach. The model contract does use the term 'applicable international law' (which it defines to include human rights law – para. 1.1) in a number of clauses, which could be used in this way, but does not identify in any detail which human rights laws and obligations arising thereunder are applicable. There is of course, a very strong argument that PSCs are not bound by international human rights law (as non-state actors lacking international legal personality) so the invocation of applicable international law is meaningless. If the contract has specifically included clauses to respect the right to life and liberty, for instance, then they would have been binding as a matter of private law, although victims, not being parties to the contract, might not be able to directly benefit from this.

⁷¹ UN's Policy on PSCs 2012 (n.5), para.4.

1 constitute strong evidence that the UN recognises that it has human rights obligations rather
2 than mere aspirations. The restriction of PSCs to the use of lethal force in self-defence or
3 defence of third parties under imminent existential threat not only ensures that they
4 operate within the confines of international human rights law, it also prevents them from
5 engaging in law enforcement or, indeed, military enforcement, both of which should be left
6 to the police and military components of the peace operations. Furthermore, the UN's
7 policies can, and should be interpreted, so as not to permit PSCs to use lethal force in
8 defence of property. However, the UN's obligations include providing a right to a remedy
9 against itself for failure to act diligently when engaging PSCs. The UN has not yet accepted
10 this in its otherwise impressive policies and guidelines.
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18 The UN has also failed to drive through human rights obligations into the model contract
19 itself, by requiring PSCs to specifically protect the right to life, liberty and freedom from
20 torture as well as respect other rights – such as freedom of assembly and cultural rights that
21 might be affected by armed PSCs. It could, for instance, have insisted on a clause that
22 required PSCs to compensate victims of proven human rights abuse at the hands of its
23 personnel, although there might be a privity of contract issue here. As with peacekeeping
24 generally, the UN's biggest weakness is in providing fair and accessible remedies for
25 individuals and their families affected by human rights violations for which the UN bears
26 responsibility.
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